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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 719.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES,

Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY,

ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR APPELLEES.

W. IRVINE CROSS,
H. L. BOND, JR.,

Solicitors for Appellees.

J. H. Furst Company, Printers and Publishers, Baltimore, Md.

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STATEMENT OF CASE.

In the year 1910 the Interstate Commerce Commission instituted of its own motion an investigation of the practice of the railroads filing tariffs in which the traffic in railroad fuel coal was treated as a different kind of traffic from the traffic in commercial coal between the same points. The report of the Commission, on page 8 of the Record, says:

> "In the territory east of Illinois and north of the Ohio River carriers quite generally have followed the practice of filing and using tariffs which named rates

> for the transportation of coal when for railroad use lower than the rates applicable to the transportation of commercial coal between the same points. The underlying question has been before the Commission in various forms many times and this proceeding was instituted by the Commission for the purpose of considering it at this time and in a formal way."

The traffic in railroad fuel coal has always been treated as a kind of traffic unlike the traffic in commercial coal between the same points, and not subject to the same transportation charge. In the system of tariffs investigated by the Commission, it has been the practice of the railroads to treat the traffic in railroad fuel coal as a separate kind of traffic from that in commercial coal. The fuel coal is consigned to a junction of the consuming road, and the separate nature of the traffic is described by using the words "for the use of that railroad."

In the report of the Commission (on page 16) its position is thus stated:

> "We have never held that the local rate to the junction point must be paid on shipments going beyond that point. What we have said is that the local rate to the junction point shall be the same to all shippers to that point, and that the through charge on shipments going beyond the junction point shall be alike for all shippers to the same destination."

The Commission has supplemented this by its Conference Ruling No. 324, published June 19, 1911:

> "DIVISIONS ON COMPANY COAL.—Upon inquiry, Held, That it is unlawful for carriers to make special and discriminatory divisions of joint rates upon locomotive fuel as between an originating or participating carrier and a purchasing carrier. In the division of

joint rates a railroad must be treated precisely as any other shipper is treated, and the Commission will regard any special division as a device to defeat the published rate. All divisions upon fuel coal must be made in good faith without respect to the fact that one of the carriers is the purchaser of such coal."

The system that the Commission's order proposes to substitute for the present is set forth in the Commission's report page 13:

> "The objections from a practical standpoint to departing from the present system do not present any grave problems or any difficulties that can not easily be overcome. A carrier has an unquestioned right to haul its own property or its own rails at will. A joint rate between the producing road and the consuming road, applying to a given point on the line of the consuming road, and out of which the producing road gets a division that is the same as its present fuel rate, would yield the same results that are yielded by the present system."

The purpose of the Commission's order was therefore to forbid the filing of tariffs in which the traffic in railroad fuel coal was treated as a separate traffic from the traffic in commercial coal, and to require that it move under precisely the same published tariffs as the commercial coal.

The Commission's order is on page 27 of the Record, and is as follows:

> "It is ordered, That the above-named respondents and interveners be, and they are hereby, directed, on or before the 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from

their present practice of maintaining and using tariffs on coal the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.

"It is further ordered, That said respondents and interveners be, and they are hereby, directed, on or before said 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers."

The question before the United States Commerce Court when it issued the preliminary injunction in this case was whether or not Section 2 of the Act to Regulate Commerce required that the two forms of traffic should be treated as like.

On May 29th, 1911, the United States Commerce Court, on petition of these appellees, passed an order suspending and enjoining the Commission's order until the further order of the Court (page 46).

On June 6th, 1911 (page 53), an appeal to this Court from that order was allowed the Interstate Commerce Commission and on June 16th, 1911 (page 58), a similar appeal was allowed to the United States of America. It is upon this appeal from the order granting the preliminary injunction that this case comes up.

Practical Results of the Two Systems.

System under Commission's Order.

We will adopt Commissioner Prouty's language on page 19 (near the bottom of the page):

"To this system, in practical operation, the defendants urge several objections;

"1. The railroad generally buys its fuel f. o. b. the mine. The rate which it pays from the mine to the junction point is the division of the joint rate. That division is a matter of contract between the two roads. It is not published and is not, therefore, necessarily known. It may be changed from day to day without notice to anyone. Coal operators who desire to sell for fuel supply complain that under this system they do not know, and can not know, what the rate is, nor whether that rate will be maintained, nor, if the rate is an unfair one, can they apply to this Commission for its correction. It is further urged that there frequently has been and that there always will be more or less manipulation in these divisions, with the result that certain mines or certain lines of railway will be preferred.

"The answer of the Commission to this objection is that it may require from the carrier a statement of its division. We may undoubtedly require carriers to inform us of their divisions and to state from time to time any changes in those divisions, but the divisions themselves are not a part of the rate which carriers are required to publish. If they were published there is no requirement which will prevent their change at the will of the carrier. This Commission has no jurisdiction to fix these divisions except in case of a joint rate established by it where the carriers have failed to agree between themselves upon the division.

"It seems clear to me that under the system which the Commission says must be followed the actual rate upon which this traffic moves never can be known; that this rate may be changed from day to day, and that it is entirely beyond the power of the Commission to correct it, if wrong. All this follows, of necessity, from the fact that whatever the theory of the case may be, in actual practice the rate upon which this traffic moves is the division of the producing carrier up to the junction point."

2. The second bad result of the system comes from the fact that while it takes into account a competition of the railroad fuel coal with the commercial coal (which is purely imaginary) it ignores the actual competition of those bidding for a railroad's fuel supply with other mines in the same group, and with coal from other fields reaching the consuming railroad at other points on its line. We will again quote from Commissioner Prouty's opinion, at page 20 (the diagram used by Commissioner Prouty and necessary to the understanding of his opinion has been omitted from the Record, and we have therefore printed the opinion with the diagram as an Appendix to this brief).

> "2. Assuming that there were any method by which this division could be made public, by which its observance could be secured, and by which it could, if unjust, be corrected, there are still serious objections to that system, which will be best shown by reference to the following diagram:

"AB is the consuming road and D the point of consumption. BC is the producing road. Y and Z

are mines upon the extreme limits of a group. It is 100 miles from D to B, 50 miles from B to Y, and 25 miles from Y to Z.

"As is almost universally the case with coal tariffs, there is a group rate from Y-Z to D, which in this case is $2 per ton, and this rate is divided between the railroads AB and BC upon a mileage basis. Upon each ton of coal originating at Y, AB would receive $1.33⅓ and BC 66⅔ cents, while upon a ton of coal originating at Z, AB would receive $1.14 2/7 and BC 85 5/7 cents. If, therefore, AB buys its fuel coal of the mine Y it pays for its transportation to B 66⅔ cents per ton, while if it buys its fuel coal at Z it pays for its transportation to B 85 5/7 cents per ton. Consequently, AB obtains its coal 19 cents per ton cheaper if it pays the same price to the mine at Y as it pays at Z. Since this is a very handsome profit in the mining of coal it is evident that Z can not compete with Y for the fuel supply of AB.

"Now, what these carriers desire to do is to make a group rate from Y to Z, somewhat greater than 66⅔ cents, and somewhat less than 85 5/7 cents, which will put the entire group upon the same competitive basis with respect to the fuel supply of the road AB which that group occupies with respect to private consumption at point D.

"If, now, we add another producing railroad, AE, and consider shipments from mine O as compared with shipments from mine Y, we have another situation. The distance from D to A is 50 miles and from A to O 100 miles. From O to D the distance is therefore the same as from Y to D, and the rate from these two mines to D for private consumption is also the same. Out of a rate of $1.50 per ton the road AB obtains $1 when the coal originates at Y and 50 cents when it originates at O; that is, if it purchases its fuel at Y it

would pay 50 cents per ton for delivery upon its rails, while if it purchased at O it must pay $1 for that service. While AB will pay something more for its coal at A than at B, since its own haul from B is somewhat greater, still there would be nothing like the difference expressed in the difference of these divisions, and what the railroads desire in this case is to make such a rate from O to A, in comparison with the rate from Y to B, as will give the mine O the same opportunity to compete for the fuel supply of AB which they enjoy in competing for private supply at point D.

"The figures above given are extreme, but the situation illustrated runs all through these coal regions and is of vast importance. Some producing coal roads handle nearly or quite one-half the entire output of their mines for railroad fuel supply. In case of many mines more than one-half the output goes to that purpose, and whether a mine shall exist is often determined by whether it can furnish railroad fuel."

System Adopted by Railroads.

The objects to be secured by a proper system of rates on railroad fuel coal were that the rates filed on railroad fuel coal should be public, fixed and subject to the control of the Commission: that they should represent the actual cost of the transportation to the consuming road: that they should take into account not the competition of the commercial coal at the point of delivery, which was an imaginary competition, but the actual competition of other coal fields reaching the consuming railroad at other points, and should in other respects be based upon and fixed by the actual circumstances and conditions of the railroad fuel traffic.

These objects are obtained by the present method. Rates on railroad fuel coal are published not to the points of consumption on the consuming railroads, but to the junction points

of the consuming railroads where the delivery is actually made. In this way the actual transportation cost to the consuming railroad is published and subject to the control of the Commission. The amount of the rate is fixed not by any reference to the rate on commercial coal to the same point, with which the fuel coal is not in competition, but by a consideration of the circumstances and conditions that affect the railroad fuel traffic itself. The rate on the railroad fuel coal to the junction point would generally be lower than the rate on commercial coal to the same point, for the following reasons:

1. The service performed by the carrier is not the same. The cars of commercial coal are shifted, separated and delivered on delivery tracks provided for that purpose, and the shipper given a certain time, usually 48 hours, sometimes more, in which to unload the car. The cars of fuel coal would simply be placed on the exchange track of the consuming railroad, and the responsibility of the delivering carrier for the car ends at once.

2. The service is different also in the fact that the commercial coal is delivered where it is to be used, while the fuel coal still has to be hauled by the consuming road to the points of consumption, the railroad fuel traffic bearing in this respect a close analogy to export traffic.

3. The shipper of fuel coal is in competition with other coals upon the line of the consuming road, with which the commercial coal is not in competition. Unless he can meet the prices upon these he can not sell to the railroad at all.

It is not denied that the system thus established has worked well. Commissioner Prouty says (page 21 at middle),

> "The system which the railroads now have in effect was first established at the request of the operators, but is now approved by all parties concerned, the operators, the producign road, and the consuming road. It is universally recognized that in no other way can the ac-

tual rate of transportation be known. In no other way can its maintenance be assured and in no other way could it, if wrong, be corrected by public authority."

There is no suggestion to the contrary in the opinion of the Commission. The very careful opinion of Commissioner Clark on the contrary devotes much time to suggesting a way in which the railroads may avoid the bad results of the Commission's order and secure the good results of the present system.

POINT I.

THE FILING OF TARIFFS IN WHICH THE TRAFFIC IN RAILROAD FUEL COAL IS TREATED AS A SEPARATE TRAFFIC FROM THE TRAFFIC IN COMMERCIAL COAL BETWEEN THE SAME POINTS IS NOT A VIOLATION OF SECTION 2 OF THE ACT TO REGULATE COMMERCE.

The system of railroad fuel rates now established by the carriers, was adopted by them at the suggestion of the coal operators, and has worked to the advantage alike of operators, consumers, railroads and dealers in commercial coal. It is not questioned by the Commission that there is no competition between the railroad fuel coal and the commercial coal. Neither is it questioned that the fuel coal is to be transported under a lower transportation charge than that to be borne by commercial coal. The position taken by the Commission is that the features of this traffic which require that it move under a lower transportation charge cannot be treated as the "circumstances and conditions" referred to in Section 2 of the Act to Regulate Commerce, if the special traffic is differentiated in the several tariffs by referring to the consuming railroads at whose junctions it is delivered, and on whose lines it is to be used. Section 2 of the Act to Regulate Commerce is as follows:

> "SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

When the railroad fuel coal is consigned to the junction point, as provided by the present system of tariffs, the circumstances and conditions that differentiated this traffic from the traffic in commercial coal consigned to the same point are:

1. The fuel coal so shipped is not in competition with the commercial coal consigned to the same point.

2. It is in competition with other coals coming upon the line of the consuming road at other points, with which the commercial coal is not in competition.

3. The transportation service is different, in that commercial coal at the junction point has reached the point of use, while railroad fuel coal reaching the consuming railroad at the junction point is still subject to a transportation service before reaching the point of use,—a transportation under the "Commodities Clause" and not under tariff.

The question then raised by the Commission's order is this:

> "Is it lawful to make a rate to the junction point on fuel coal different from that on commercial coal, it

> being admitted that the fuel coal is not in competition with the commercial coal, that it is in competition with coals with which the commercial coal is not in competition, and that the rate will carry the commercial coal to the point of consumption and will not so carry the fuel coal?"

The effect of the Court's order and Report is:

> "Do not publish any rate to the point where the fuel coal is actually delivered.
>
> "Name a delivery point where the coal is not really delivered.
>
> "Publish a joint rate to that point that is not a real rate.
>
> "You can, if you choose, call your present rate to the actual point of delivery a division, and make a voluntary publication of it."

By this complex and roundabout method we maintain an apparent identity of rates upon two unlike forms of traffic, but secure the real difference in rates which the unlikeness of the two forms of traffic requires, by calling one a rate and one a division.

It is significant that the Commission's Report, while finding that the railroad fuel traffic is a like kind of traffic under Section 2 with the traffic in commercial coal, does not discuss at all the bearing on this question of the two most important features of the railroad fuel traffic—the two features which we think in themselves make it an unlike traffic to that in commercial coal, viz.: that it does not come into competition with the commercial coal and is in competition with coals coming on the railroad's line at other points.

Section 2 of the Act makes it unlawful by any device to charge a greater or less compensation "in the transportation of a like kind of traffic under substantially similar circum-

stances and conditions." The Commission's Report says that to openly charge a lower rate for the fuel coal from the point of shipment to the junction point comes within the prohibition and is unlawful. It then proceeds to furnish us with a device that will, to use its language, "*yield the same results that are yielded by the present system*"—in other words enable us to charge a lower rate for the fuel coal than for the commercial coal between the same points.

We deliver the fuel coal to the consuming road at the junction point at a different rate from that paid by the commercial coal to the same point. We have only to publish a nominal delivery point beyond the real delivery point, publish a rate to that point that we do not intend to charge and call our actual rate to the junction point, based on the special circumstances and conditions, a "division." The suggestion strikingly illustrates how readily the Commission's order lends itself to manipulation of rates. If, under it, the Commission can so easily juggle a rate for a good purpose, will not ingenious traffic agents and coal operators do the same for their own perverse ends? The device with which Commissioner Clark hopes to get rid of the effects of the Commission's order strikingly illustrates also the force of Commissioner Prouty's statement in regard to the present system (page 21 of Record):

> "It is universally recognized that in no other way can the actual rate of transportation be known. In no other way can its maintenance be assured, and in no other way could it, if wrong, be corrected by public authority."

But what is the legal necessity for all this legerdemain? Why may we not do openly what we do by indirection, viz., publish the actual rate to the actual point of delivery (the junction point), fixing the rate by the "circumstances and conditions" that govern this traffic? Why keep up the legal fiction of identity of two forms of traffic, that we intend

to treat as unlike? It is a question of words. A question of the nomenclature to be used in tariffs. The commercial coal is delivered at a certain railroad junction point, and the railroad's fuel coal is also delivered there. The commercial coal has reached its point of use. The fuel coal can only be used after further transportation. The rate that will move the commercial coal would not move the railroad fuel coal, because it is subject to a competition that the commercial coal is not. Between the two coals there is no competition or interest in one another's rates. There is every reason why the fuel coal should bear a different transportation charge to that point of delivery. So far, the Commission is in full accord with us. It admits that the traffic should go under a different transportation charge. It forbids us, however, to file that transportation charge as a rate to that point of delivery, because we would have to describe the fuel coal as "railroad fuel coal to be used on a certain railroad." This, it says, makes it a rate "restricted to certain consignors or consignees," or "restricted to shipments . . . . when the coal transported is for a particular use." The railroads have used to describe a commodity that is carried by a railroad without any tariff rate, precisely the language that has been used by Congress in the "commodities clause" to describe the only commodities that can legally be so carried. The language of the "commodities clause" is:

> "such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

When Congress in the commodities clause wished to describe the only commodities that could be transported by a railroad without any tariff at all, it described them, identified them, by the very language that the railroads have employed to identify the commodity carried in this traffic.

When the railroads want to describe such coal as may under

the commodities clause be transported by the receiving railroad without any tariff rate, why may they not use the same language that Congress has used?

Is not this suggestion of a rate "restricted to certain consignors" somewhat artificial? No one will claim that a special rate can be given to a particular consignee based simply on his personality, but a consignee may receive a special rate on a special kind of traffic. Neither can a special rate be given because of the use to which a commodity is to be put. But it would be a strange principle that a rate could not be influenced by the place where the commodity was to be used, or the transportation it must still undergo in reaching the point of use. A railroad (as distinguished from a railroad company) is not a person. It is, rather in the nature of a geographical division, and extends through long distances. A railroad's use of coal for fuel is not different from the use of it by any other consumer of fuel. The service in delivering it at the junction point differs in the fact that the coal still has to be transported through long distances to secure its use at all.

There is no more reason why the line of a railroad should not be used to point out the place where or within which a commodity is to be used than that a river, a county or a city should not be so used. When a tariff uses the expression "railroad fuel coal delivered at junction of the A. B. Railroad for use on that railroad," that marks off, as clearly as language can, a coal, delivered at that junction point subject to transportation along that railroad under the "Commodities Clause" and that is in competition with other coals coming on that railroad at distant points. It is hard to see how coal delivered to a railroad at a junction point, subject to a further transportation to the point of use, differs in principle from a commodity delivered at a seaport but subject to a further transportation out of the country. On this subject Commissioner Clark uses this language (page 15):

> "It is suggested that these special fuel rates are analogous to export and import rates, and the Pitts-

> burgh Glass case, 13 I. C. C. Rep. 87 and the Import Rate case, 162 U. S., 197, are cited in that connection. We are not prepared to admit that analogy, but even if it does exist, the export and import rates are open and available alike for all shippers, while the rates here considered are restricted in their use to certain shippers, or are conditions upon the commodities being put to a certain use."

This distinction is not real. The railroad fuel rates are "open and available alike for all shippers," that is, for all shippers wishing to engage in the special traffic on which the rates are made. They are not restricted to certain shippers. They are not "conditioned upon the commodities being put to a certain use." They are limited to a service where the commodity is subject to further transportation under the "Commodities Clause," before reaching the point of use. We claim that the analogy in principle of the railroad fuel traffic to the import traffic and the export traffic is complete.

The Commission decides that the facts regarding the railroad fuel traffic that justify the allowing to it a different transportation charge by indirection, cannot be considered by them as the circumstances and conditions that under section 2 justify a different rate: that they can not be considered by them under that section as constituting an unlikeness in the kind of traffic or an unlikeness in the service rendered.

The question came up before the Commission in the Import Rate case (162 U. S., 197) whether or not under section 2 the Commission could consider ocean competition and circumstances and conditions that exist beyond the seaboard of the United States as justifying a difference in rates between import and domestic traffic. The Commission held that it could not. This court held that it could. The Commission in the Pittsburgh Plate Glas case (13 I. C. C. Rep. 87) followed this, and in Kemble *vs.* B. & A. R. R. Co., (8 I. C. C. Rep. 118) applied the same principle to shipments for export. The features

that were allowed to differentiate export and import traffic from domestic traffic between the same points were these:

1. That while the cost to the carrier of the transportation service between the same points was the same, the value of the transportation service in the Import and Export Traffic to the shipper was less than in the domestic traffic.

2. That the import and export traffics were subject to competition with transportation routes not under control of the Commission.

Both of these were circumstances and conditions not taking place during the carriage under the rate.

The position taken by the Commission in the import rate case, quoted in 162 U. S., 207-208, was as follows:

> "The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of tariffs of rates and charges, but has left it to the unre-

> strained competition of ocean carriers and all the circumstances and conditions surrounding it. The circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction."

This was a decision that the most important features of a tariff, those that conditioned it and gave it its entire character would, under section 2, be ignored by the Commission unless they were under the Commission's control.

This court substituted for this a construction making it the right and duty of the Commission under section 2 to deal with the real nature of the tariffs and the actual circumstances and conditions that gave it its character, and not with a selected part of its features. The Commission there, as in the present case, was stripping itself of the powers necessary to the proper performance of its duties.

On page 217 the Court said:

> "The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions' as they are directed in the act to consider. The Com-

mission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its pro rata share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act we think the Commission erred."

Again, on page 219, the ~~Commission~~ Court said:

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or not 'unjust.'"

In the present case there is, as in the import case, a movement of the railroad fuel coal after reaching the point of delivery at the junction, before it reaches the points of use. It is not under control of the Commission but it makes the carriage to the junction a distinctly different transportation service from that which brings the commercial coal to the same

point. There is a competition between the fuel coal and coals reaching the railroad line at other points, to which the commercial coal is not subject, just as the import traffic was subject to a competition with other lines to which the domestic traffic was not subject. These are not only actual and potent circumstances and conditions that "would be regarded by carriers apart from the operations of the statute as 'matters which warrant differences in charges,' but the necessity of so treating them is actually recognized by the Commission itself. Without these differences the fuel traffic will not move. They are precisely the differentiating features that are meant to be considered under section 2 of the act.

POINT II.

The Commission's method of filing fuel coal rates is illegal under Section 6 of the Interstate Commerce Act and under the Elkins Act.

Section 6 of the Interstate Commerce Act prescribes the method of filing rates, and uses this language:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The

schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Subsequently, in the same section, there is this language:

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

And again:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connec-

> tion therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

In the Elkins Act, in its first section (near the beginning thereof), there is this provision:

> "and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

The method of filing tariffs on the railroad fuel coal now practiced by the railroad conforms strictly to these provisions in spirit and in letter. The method prescribed by the Commission's order is an open violation of both. The provision that "No carrier shall . . . . engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with this Act," is treated as a dead letter, so far as the railroad fuel coal is concerned. The railroads are instructed to file tariffs in which the published rates are not the

rates upon which that coal is transported. They are even instructed to publish an inconvenient destination and engage in a needless haul in order that there may be a part of the published rate that is not really paid. In order to conform to the law, even if the point of delivery be made as required by the Commission, the tariffs would have to set forth the points between which the fuel coal and the commercial coal were transported and the exact rate under which each of them was transported. The tariff would have to show on its face that between the same points the rate under which the fuel coal was transported was different from that under which the commercial coal was transported. It all goes back to the same principle that we have dwelt on under Point I. The traffic in fuel coal involves a transportation of the fuel coal for a part of its route without paying any transportation charge. This makes the transportation of it an unlike kind of traffic from that in commercial coal, and we can not legally avoid the effect of section 2 by a violation of section 6. Congress never intended that the tariffs prescribed in section 6 should cover the transportation of the carrier's own property.

POINT III.

THE UNITED STATES COMMERCE COURT HAD POWER TO REVIEW ON APPEAL THE CONSTRUCTION PUT BY THE COMMISSION ON THE ACT TO REGULATE COMMERCE EVEN THOUGH THE SUBJECT-MATTER OF THE ORDER WAS WITHIN THE JURISDICTION OF THE COMMISSION AND THE ORDER DID NOT VIOLATE ANY CONSTITUTIONAL RIGHT.

This question is raised by the Interstate Commerce Commission in its second assignment of error, page 50. The assignments of error by the Interstate Commerce Commission from the 3rd to the 15th, inclusive, while purporting to set forth matters decided by the Commerce Court, do not, we think,

clearly and fairly state the question that was before that court for decision, as will appear from an examination of the Commission's order and its report. The persistent suggestion that the fuel coal rates are based upon the personality of the shipper and the use of the coal, the persistent ignoring of the features that differentiate the fuel coal traffic, make it necessary that we state the actual law questions that were before the Commerce Court in considering the Commission's order. The first law question involved was as follows: "Is the filing of tariffs in which the traffic in Railroad Fuel Coal is treated as an unlike traffic to the traffic in commercial coal between the same points a violation of section 2 of the Act to Regulate Commerce?" A second law question was: "Has the Commission power, under section 6 of the Act to Regulate Commerce, to order the filing by the railroads of tariffs under which the carrier is to receive a different compensation for the transportation of railroad fuel coal between the points named in such tariffs than the rates and charges which are specified in the tariffs filed and in effect at the time?"

The theory that the Commission can, by an interpretation of the law that created it, strip itself of a part of its powers and duties, and that in so construing the law its action should not be subject to appeal, would seem to be a proposition not requiring more than the statement of it. In the Import Rate case, 162 U. S., 197, a question was involved very similar to that which is raised in this case, to wit.: whether or not import traffic constitutes a like kind of traffic with domestic traffic between the same points. The Commission held that certain essential features of the import traffic were not circumstances and conditions that it could consider under section 2 of the Interstate Commerce Act. The court says, on page 217:

> "The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign

traffic as such 'circumstances and conditions' as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its pro rata share of such rates, was an act of 'unjust discrimination' within the meaning of the act."

"In so construing the act we think the Commission erred."

On page 210, the court, after quoting the Commission's own language, says:

"It is obvious, therefore, that the Commission in formulating the order of January 29, 1894, acted upon the view of the meaning of the statute which is expressed in the foregoing passage. We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce. If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not."

In the case of Louisville etc. R. R. Company *vs.* Behlmer, 175 U. S. 648, the question was whether or not the Interstate Commerce Commission could legally ignore certain circumstances and conditions as being circumstances and conditions that should have been considered by them under the fourth section of the act, the long and short haul clause. This court, on page 654, used the following language:

"This determination of the Commission to restrict its examination of the evidence solely to the extent ne-

cessary to enable it to ascertain the source and inherent character and not the materiality and substantiality of the competition, and therefore to exclude wholly from view the latter considerations, was predicated on the conclusion that, as a matter of law, no competition, however great might be its influence on carriage and rate making, could be by the carrier taken into consideration, of his own motion, in determining whether a lesser sum would be charged for the longer than for the shorter haul, if such competition arose from the sources or was wholly of the character which it was found by the Commission the proof established the competition relied on to be. That is to say, the Commission concluded, as a matter of law, that it was unnecessary to weigh the facts for the purpose of determining the materiality and extent of the competition, because, however strongly the proof might demonstrate its potency upon traffic and rates, nevertheless it would be without efficacy to give rise to such substantial dissimilarity as would justify the carrier, of his own motion, to charge a lesser rate for the longer than for the shorter haul."

And again, on pages 672-673, the court spoke as follows:

"The Commission and the Circuit Court of Appeals, it is asserted, although they may have expressed erroneous opinions as to the construction of the statute, yet, ultimately, in substance, decided, as a matter of fact, that the competition was not of sufficient weight to bring about dissimilarity of circumstances and conditions. But this suggestion is without merit. We have shown, in our previous analysis of the action of the Commission and of the views expressed by the Circuit Court of Appeals, that whilst the facts were considered in so far as was necessary to determine that the competition was due only to certain particular causes, the result of

the competition was not examined in order to ascertain the substantial materiality of its operation on traffic and rates. And this, because both the Commission and the Circuit Court of Appeals determined that competition of the particular character which they found that relied on to be, as a matter of law, however weighty in its operation on rates, was not legally entitled to be considered in reviewing the action of the carrier.

"This failure to consider the evidence points to the distinction between this cause and that of Cin., N. O. & Texas Pacific Railway *vs.* Interstate Commerce Commission, 162 U. S. 184, upon which reliance is placed. In that case the court, from an examination of the whole record, considered that the result of the action of the Commission and the Circuit Court of Appeals had been substantially to decide not that the character of competition relied on could not be taken into view, but that fully weighing and considering it, sufficient proof did not result to show that it was so substantial and so material as to justify deciding that there were dissimilar circumstances and conditions."

In the case of East Tennessee etc. Ry. Company vs. Interstate Commerce Commission, 181 U. S. page 1, the question was as to what "circumstances and conditions" would be considered by the Commission as giving the right under section 4 of the Interstate Commerce Law to charge more for a short than for a long haul. The Commission held that however controlling competition might be on rates to any given point, if it arose from the action of one or more carriers who were subject to the act to regulate commerce, dissimilarity of circumstances and conditions provided in the 4th section could not be produced by such competition unless previous assent of the Commission was given to the taking by the carrier of such competition into view in fixing the rates to the competitive points. This court said, on page 12,

> " But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute which relieves from the long and short haul clause arises from the command of the statute and not from the assent of the commission; the law, and not the discretion of the commission, determining the rights of the parties. It follows that the construction affixed by the commission to the statute upon which its entire action was predicated was wrong."

In the case of Southern Ry. Company vs. St. Louis Hay & Grain Company, 214 U. S. 297, the Interstate Commerce Commission held that where the railway company performed for a hay company certain services in the reconsignment of its hay which the shipper could not demand from it but which the carrier could lawfully render, the railway company could only charge what amounted to the actual cost to it of rendering the service. This court held that the Commission was wrong and that the carrier was entitled to receive some compensation beyond the mere cost of rendering the service.

In the case of Interstate Commerce Commission vs. Northern Pacific Ry. Company, 216 U. S. at page 538, the Commission, acting under the power given them in the Hepburn Act to establish through routes and joint rates " where no reasonable or satisfactory through route exists," passed on order upon its own motion requiring the establishment of a certain through route and the rates upon it. On a proceeding to enjoin the enforcement of the order it was contended that the question of whether or not the through route already in existence was reasonable or satisfactory rested with the Commission. The facts relating to

the existence and character of the through route already in existence were practically undisputed. This court held that it had power to inquire whether or not it was or was not a reasonable or satisfactory through route in the sense of the statute. It decided that there was no case for the action of the Commission, using this language:

> "But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for the view of the law upon which this Court must pass."

In the case of Interstate Commerce Commission vs. Delaware Lackawanna & Western Ry. Company, 216 U. S. 531, the Interstate Commerce Commission, at the instance of a railway, passed an order to compel the D. L. & W. Ry. Company to furnish it a switch connection. The right exercised by the Commission of giving a switch connection was, in the Act, described as the power to compel "switch connections with lateral roads" and only "at the instance of shippers." The application in this case was not at the instance of a shipper, and this Court held that the Commission erred in passing the order.

In Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S., 235, the Commission passed an order requiring carriers to remove from their tariffs a provision which prohibited forwarding agents from obtaining the benefit of the carload rates. This court held that the ruling of the Commission involved a question of law, viz., the right of the carrier to make the ownership of goods the criterion by which the charge for carriage is to be measured. This court decided against this right and affirmed the construction of the law taken by the Commission, refusing to go into the Commission's finding of fact.

In all of these cases the subject matter of the order was

within the jurisdiction of the Commission. There was no question involved of its violation of any constitutional right, but the court treated the action of the Commission in each case as involving a question of law and reviewed the decision of the Commission thereon.

In the present case the question whether or not the Commission can refuse to consider the features of the fuel traffic, as making it an unlike traffic with the traffic in commercial coal, is a pure question of law, difficult to distinguish in principle from that which was decided in the Import Rate case.

The fact at the root of the whole matter is the fact that the railroad fuel coal on the line of the consuming road does not pay tariff rates because the charge goes to the carrier owning the coal. This fact is undisputed and indisputable. From this fact flow the consequences so clearly explained by Commissioner Prouty. These consequences are not and can not be denied. That there can be no competition between the railroad fuel coal and commercial coal results from the same fact. The Court need not be told that coal paying tariff rates cannot compete with coal that pays nothing. The effect of these consequences from the one fact is that the railroad fuel coal market is commercially a distinct market to itself. As explained by Commissioner Prouty the through rates published on commercial coal, if attempted to be applied to coal going into the railroad fuel market, will not fit, and will produce inequalities and impossibilities with respect to shippers to whom the same rates give equality and access to market for commercial coal.

The appellees contend that the undisputed facts above stated distinguish the traffic in railroad fuel coal from the traffic in commercial coal within the meaning of the term "traffic" in the second section of the Act, and that the service performed in transporting coal destined for the railroad fuel market is not a like service to that performed in transporting coal destined for the commercial market. The values of the services are commercially different and determined by different factors.

POINTS IN APPELLANTS' BRIEF.

For the most part, the points raised in appellant's brief have been covered in previous argument. In its second point on page 22 and 23, appellant's brief states that the circumstances and conditions referred to by appellee may be summarized under three separate heads, giving the first two of those as follows:

(1) Those arising before the traffic is delivered by the consignor to the carrier for transportation at point of origin.

(2) Those arising after the traffic is delivered by the carrier to the consignee at point of destination.

And on the same page it says

> "Concerning matters covered by the first two paragraphs of the summary it is not necessary to make an extended argument, because this court has ruled repeatedly that such matters cannot be used to justify disparities in rates where, as in this case, the transportation is over the same line, in the same direction and between the same points."

It quotes as authorities in support of this portion Wight vs. U. S. 167 U. S. 512, 518; Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U. S. 144, 166-167; Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S. 235, 252-254.

In the Import Rate case in 162 U. S. which we have above quoted, circumstances and conditions arising before the traffic was delivered by the consignor to the carrier for transportation at point of origin were recognized as creating an unlike kind of traffic.

In the opinion in the case of Pittsburgh Plate Glass Co. vs. O. C. C. & St. L. Co., (delivered subsequent to both the cases

of Wight vs. U. S. and Interstate Commerce Commission vs. Alabama Midland Ry. Co., Interstate Commerce Reports No. 13, page 100, the Commission said:

> "Transportation from a seaport of the United States or an adjacent foreign country to an interior American destination in completion of a through movement of freight from a port of a foreign but not adjacent country, whether upon a joint through rate or upon a separately established, or proportional inland rate applicable only to imports moving through, is not a 'like service' to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination.
>
> "It is true the court held in the case of Wight vs. United States, 167 U. S. 512, that the existence of competition did not create 'dissimilar circumstances and conditions' such as to justify discrimination as defined in the second section. But this referred to unjust discrimination as between different shippers over the same line in the performance of a 'like service,' and as we have seen, the transportation of import traffic from the port of entry to an interior destination in completion of a through movement from a point in a foreign country is not a like service to that involved in the transportation of domestic traffic originating at such port, even where the transportation in all other respects is performed under like conditions.
>
> "It follows that the charge of unjust discrimination in violation of section 2 of the act is not sustained."

In the case of Kimble vs. Boston & Albany R. R. Co., Interstate Commerce Reports, volume 8, page 110, also decided subsequently to the Wight case, the same distinction was made as between the export traffic and domestic traffic.

The principle of the Import Rate case is distinctly recogniged in the decisions of this court as being still in force. Neither the decision in Wight vs. U. S. or Interstate Commerce Commission vs. Alabama Midland Ry. Co. have been given in this court the meaning attributed to them in Appellant's brief.

Respectfully submitted,

H. L. BOND, JR.,
W. IRVINE CROSS,
Solicitors for Appellees.

APPELLEES' EXHIBIT A.

Dissenting Opinion of Commissioner Prouty.

PROUTY, *Commissioner,* dissenting;

I agree that the rate can not be varied according to the use to which an article is put; that a rate must be open to the whole public and can not be confined by its terms to an individual or a class; that a railroad can not be accorded a lower rate simply because it is a railroad; but I think that the movement of coal for railroad fuel supply so differs from the movement of coal for private use that a different system of rate making may properly be applied to its transportation.

My thought will be best understood by referring to the system which the Commission thinks should be observed, in comparison with the system now in force, and which the defendant railways desire to continue.

All traffic must move under some published rate, and this applies to property owned by a railroad when moving over another railroad. Ordinarily, a railroad does not consume its coal at the junction point where it receives it from its connection, but hauls it to some other point upon its line, where it is taken from the cars for use upon its locomotives or for other consumption. If a private individual shipped coal from the mine to this consuming point, the rate charged would usually be a joint through rate materially less than the same rates up to the junction point plus the local rate of the consuming road to the point of consumption. Now, the Commission holds that a railroad may bill its coal to the consuming point at the rate which a private shipper would pay. Since the joint through rate is usually so divided between the producing road and the consuming road that the amount received out of it by the producing road is less than the local rate from the mine up to the

junction point it results that by this process the consuming road obtains its freight for less than it would had the traffic been billed to the junction point and received by it at that point. Otherwise stated, the rate upon which this coal moves to the rails of the consuming road is the division of the producing road.

To this system, in practical operation, the defendants urge several objections:

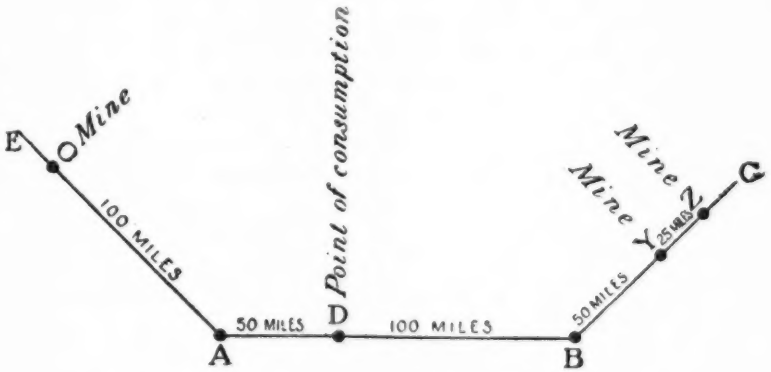
1. The railroad generally buys its fuel f. o. b. the mine. The rate which it pays from the mine to the junction point is the division of the joint rate. That division is a matter of contract between the two roads. It is not published and is not, therefore, necessarily known. It may be changed from day to day without notice to anyone. Coal operators who desire to sell for fuel supply complain that under this system they do not know, and can not know, what the rate is, nor whether that rate will be maintained, nor, if the rate is an unfair one, can they apply to this Commission for its correction. It is further urged that there frequently has been and that there always will be more or less manipulation in these divisions, with the result that certain mines or certain lines of railway will be preferred.

The answer of the Commission to this division is that it may require from the carrier a statement of its division. We may undoubtedly require carriers to inform us of their divisions and to state from time to time any changes in those divisions, but the divisions themselves are not a part of the rate which carriers are required to publish. If they were published there is no requirement which will prevent their change at the will of the carrier. This Commission has no jurisdiction to fix these divisions except in case of a joint rate established by it where the carriers have failed to agree between themselves upon the division.

It seems clear to me that under the system which the Commission says must be followed the actual rate upon which this

traffic moves never can be known; that this rate may be changed from day to day and that it is entirely beyond the power of the Commission to correct it, if wrong. All this follows, of necessity, from the fact that whatever the theory of the case may be, in actual practice the rate upon which this traffic moves is the division of the producing carrier up to the junction point.

2. Assuming that there were any method by which this division could be made public, by which its observance could be secured, and by which it could, if unjust, be corrected, there are still serious objections to that system, which will be best shown by reference to the following diagram;



AB is the consuming road and D the point of consumption. BC is the producing road. Y and Z are mines upon the extreme limits of a group. It is 100 miles from D to B, 50 miles from B to Y, and 25 miles from Y to Z.

As is almost universally the case with coal tariffs, there is a group rate from Y-Z to D, which in this case is $2 per ton, and this rate is divided betwen the railroads AB and BC upon a mileage basis. Upon each ton of coal originating at Y, AB would receive $1.33⅓ and BC 66⅔ cents, while upon a ton of coal originating at Z, AB would receive $1.14 2/7 and BC

85 5/7 cents. If, therefore, AB buys its fuel coal of the mine Y it pays for its transportation to B 66⅔ cents per ton, while if it buys its fuel coal at Z it pays for its transportation to B 85 5/7 cents per ton. Consequently, AB obtains its coal 19 cents per ton cheaper if it pays the same price to the mine at Y as it pays at Z. Since this is a very handsome profit in the mining of coal it is evident that Z can not compete with Y for the fuel supply of AB.

Now, what these carriers desire to do is to make a group rate from Y to Z, somewhat greater than 66⅔ cents, and somewhat less than 85 5/7 cents, which will put the entire group upon the same competitive basis with respect to the fuel supply of the road AB which that group occupies with respect to private consumption at point D.

If, now, we add another producing railroad, AE, and consider shipments from mine O as compared with shipments from mine Y, we have another situation. The distance from D to A is 50 miles and from A to O 100 miles. From O to D the distance is therefore the same as from Y to D, and the rate from these two mines to D for private consumption is also the same. Out of a rate of $1.50 per ton the road AB obtains $1 when the coal originates at Y and 50 cents when it originates at O; that is, if it purchases its fuel at Y it would pay 50 cents per ton for delivery upon its rails while if it purchased at O it must pay $1 for that service. While AB will pay something more for its coal at A than at B, since its own haul from B is somewhat greater, still there would be nothing like the difference expressed in the difference of these divisions, and what the railroads desire in this case is to make such a rate from O to A, in comparison with the rate from Y to B, as will give the mine O the same opportunity to compete for the fuel supply of AB which they enjoy in competing for private supply at point D.

The figures above given are extreme, but the situation illustrated runs all through these coal regions and is of vast im-

portance. Some producing coal roads handle nearly or quite one-half the entire output of their mines for railroad fuel supply. In case of many mines more than one-half the output goes to that purpose, and whether a mine shall exist is often determined by whether it can furnish railroad fuel.

The system which the railroads now have in effect was first established at the request of the operators, but is now approved by all parties concerned, the operators, the producing road, and the consuming road. It is universally recognized that in no other way can the actual rate of transportation be known. In no other way can its maintenance be assured, and in no other way could it if wrong, be corrected by public authority.

The purpose of the act to regulate commerce is to facilitate, not to impede, commercial operations. When shippers and railways unite in asking that a particular thing be done; when that thing is manifestly for the interest and convenience of all parties; when no harm can result, but when, upon the contrary, the fundamental purposes of the act will be promoted, I think we should, if possible, put such a construction upon this statute as will permit it.

It does not seem to be seriously claimed by the majority that the present method of publishing these fuel-supply rates is attended with any practical wrong, but it is said that the second section of the act peremptorily forbids it and that it is therefore unlawful and must be so declared by us.

The second section provides that where the service is like and contemporaneous, the traffic of a like kind, and the circumstances and conditions under which the transportation occurs substantially similar, the rate shall be the same. The majority hold that a railroad stands like any other shipper and that to accord one rate when the shipment is for a railroad and another rate when it is for a private individual is to violate that section. I concede this to be so if the only difference in the transaction be that the freight money is in one case paid by a railroad company and in the other case by a private party,

but I think that there are other incidents of the transaction arising out of the circumstance that this fuel is for railroad supply and is received at the junction point by a railroad, which excepts the case from the operation of the second section.

To understand just what is meant, look at the diagram above given. The rate now published from Y to B when the coal is for railroad-fuel supply is less than the rate for a private shipment delivered at B. Now, it is urged that since the transportation between these points may be at the same time and in the same train it is prohibited by the second section to charge one rate for the car of private coal and a different rate for the car of public coal.

It is said that the Supreme Court of the United States in the *Wight case,* 167 U. S. 512, held that the words "circumstances and conditions," as used in the second section of the act, refer exclusively to the service of transportation and that in order to make out a dissimilarity of circumstance and condition under that section it is necessary to show a different transportation service. I am not prepared to admit that such is the fair interpretation of that case as applied to a set of facts like those now before us; but assuming that it is, nevertheless it seems to me that upon the strict rule of that case as so construed the circumstances and conditions attending the transportation of this fuel coal substantially differ from those under which private coal is handled.

The transportation of the private coal from Y to B involves a delivery at B. To affect this, tracks must be provided upon which that delivery can be made, and the shipper must be given a certain length of time, usually 48 hours and sometimes more, in which to unload his coal. Upon the other hand, delivery of fuel coal is made upon the exchange track of the common carrier for whom the coal is intended, and no use of the car is involved, since as soon as the car is placed upon the exchange track at the service of the connecting carrier, that carrier accounts for the use of the car to its owner and relieves

the railroad handling the coal from Y from that burden. It is perfectly evident, therefore, that the carriage and delivery of the fuel coal costs the producing carrier less than that of the private coal. Here, therefore, is a difference in circumstance and condition which takes the case from the operation of the second section.

It is suggested that the comparison ought to be between the transportation from the mine to the point upon the consuming road where the coal is finally consumed. If this were so the delivery to a private individual is not analogous to that taken by the railroad company itself at the point of consumption. but, certainly, it can not be true that the consuming railroad must handle this traffic upon its own line under a published tariff. It may receive it at the junction point and subsequently transport it over its own rails without reference to any tariff rate.

It is said that if this be so then carriers might make a lower rate in favor of any shipper who would provide tracks and other facilities for the speedy unloading of coal, and that the effect of such rates would be to throw the handling of coal into the hands of large operators who could provide such facilities. Our second section is essentially a reenactment of the English equality clause, and if our court follows in the interpretation of that section, the lead of the English court in its treatment of the equality clause, it must hold that where the cost of transportation and delivery is less a difference in rate is not forbidden. This is well shown by reference to Denaby Main Colliery Co. v. M. S. & L. Ry. Co., 11 App. Cases, 97.

The defendant railway company was engaged in transporting coal from the South Yorkshire field to the port of Grimsby. At that destination team tracks had been provided by the defendant for the delivery of its coal, and the complainant colliery company took delivery of its shipments upon these team tracks.

Bannister, a competitor of the complainant, had provided at Grimsby, yards with tracks and various facilities for the unloading of coal, and it was found that the cost to the defendant of delivering coal into the yards of Bannister was less than the cost of delivering upon its team tracks to the complainant. Under these circumstances the court held that the equality clause of the English act did not apply, but that since the cost of the service to the defendant was less in the case of Bannister than in the case of the complainant, a lower rate might properly be made to him.

If our court holds, as it apparently has indicated in the Wight case, that difference of circumstances and conditions may be shown by showing the difference in cost of service, it is difficult to see how it can avoid the conclusion that, when the cost of service for any reason is less in transporting the freight of one person than in transporting that of another, the second section does not apply. It should be borne in mind that the third section may prevent the making of the lower rate, even though it be lawful under the second. The prohibition of the second section is absolute within the sphere of its operation. If the service is like and contemporaneous, the kind of traffic like, and the circumstances and conditions of the transportation the same, then the rate must also be the same. The third section is more elastic. It forbids undue discrimination or advantage, and it is for us to say, upon consideration of all the facts, whether that section has been violated.

It seems to me, therefore, that the circumstances and conditions attending the transportation and delivery of this fuel coal are different from those under which private coal is handled, and that for this reason the second section does not forbid the making of different rates for the different services, and if this be so then the second section has no application whatever. I think, however, that there is a broader and more fundamental ground upon which the operation of that section can be distinguished. This fuel coal is not, to my mind, a like kind of traffic with private coal nor is its carriage a like

service within the meaning of that section. Even though the physical service performed be exactly the same it is not a violation of the second section, upon the part of the carrier, to demand and receive a different compensation for that service.

If we were to follow the history of a dozen cars of coal taken on at the same mine, moving in the same train and delivered at B upon the same track to its connection, we might find that the carrier received a different rate for every car. It is true that this difference in compensation might be due to the fact that the traffic was intended for different points and that the division of the carrier differed according to the destination of the shipment; but it is also true that carriers habitually make what are known as proportional rates up to the junction point which are less than the local rate. Traffic handled upon through rates or upon proportional rates is not a like kind of traffic with that which begins at the mine and ends at the junction point, nor is the service a like service, and even though the cost of the transportation is precisely the same, the carrier may impose a different charge.

The fact that this fuel coal is to be consumed at some point beyond the junction; that from the junction point it is carried by the railroad which is to consume it, and which is or may be entitled to a division of the through rate to the point of consumption, gives this business traffic incidents which do not attach to ordinary private coal. It is this fact which renders it impossible to know the rate upon which the fuel coal is handled; to compel a publication and maintenance of that rate; or to control the rate by Government authority. This business is closely analogous to export and import traffic.

It is well understood that the rate applied on certain commodities when for export is lower to nearly if not all ports of export in the United States and Canada than when for domestic compensation. It may be true that in most instances the physical incidents of the transportation are somewhat different in the case of the export than of the domestic business, but this is not the broad ground upon which the lower rate is

justified. It is because the carriers in the treatment of this export traffic may consider the point of origin, the point of final destination, the possibility of transporting this traffic by different avenues, the fact that the commodities transported must compete abroad with similar commodities produced in other countries which justifies the lower export rate. If it should turn out in some individual cases that the cost of handling business was exactly the same whether for export or for home consumption still the export rate would undoubtedly be sustained. To deny carriers the right of maintaining lower export tariffs than apply to domestic business would shut up two-thirds of the ports of export in the United States.

Exactly the same thing is true, and for exactly the same reason, of imports. This business may move from the port to the interior destination in the same train and for precisely the same expense as domestic traffic, but it need not for that reason bear the same rate. It is not a like service. This is well pointed out in the Pittsburg Plate Glass case, 13 I. C. C. Rep., 87, in which the Commission said:

> Transportation from a seaport of the United States or an adjacent foreign country to an interior American destination in completion of a through movement of freight from a port of a foreign but not adjacent country whether upon a joint through rate or upon a separately established or proportional inland rate applicable only to imports moving through, is not a "like service" to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination.
>
> It is true the court held in the case of Wight v. United States, 167 U. S., 512, that the existence of competition did not create "dissimilar circumstances and conditions" such as to justify discrimination as defined in the second section. But this referred to unjust discrimination as between different shippers over the same line in the performance of a "like service," and, as we have seen, the transportation of import traffic from the port of entry to an interior destination in completion of a through movement from a point in a foreign country is not a like service to that involved in the transportation of domestic traffic originating at such port even where the transportation in all other respects is performed under like conditions.
>
> It follows that the charge of unjust discrimination in violation of section 2 of the act is not sustained.

The lower import rate has been expressly approved by the Supreme Court of the United States in the Import Rate case, 163 U. S., 197. In that case the traffic originated at Liverpool and was intended for San Francisco. It moved to New Orleans by water and from New Orleans to San Francisco by rail. The amount received by the rail carrier was materially less than the rate for the transportation of exactly the same articles from New Orleans to San Francisco, but the court held that this was not prohibited by the act to regulate commerce. The court held in that case that the import traffic was not a like kind of traffic with that originating at the port of import.

So here it seems to me that when all the circumstances which surround this fuel-coal traffic are considered it is not a like kind of traffic, under the second section, with coal transported for private consumption, nor is the service a like service, and while there may be to-day grave doubts as to the final decision my belief is that the Supreme Court should and will finally so hold. I can see no other theory upon which rates which are vital to the handling of the business of this country can be justified.

The second section is directed against discrimination between shippers. To charge one person one rate and another person another rate for the performance of exactly the same service is a wrong which that section was intended to prevent. But there is no wrong when the private consumer who receives his coal at B is charged a different rate for the transportation from Y than is imposed for carrying railroad coal from Y to B and there delivering it to the connecting railroad for use at the various points upon is line. The wrong does not exist because the service is not the same, and since there is no wrong the statute ought not to be so construed as to impose a penalty.

It is suggested that if railroads be allowed to make special rates for the transpetation of coal when for railroad use the same privilege must be extended as to other railroad supplies; and this is probably true, although the convenience of the rail-

ways in seeking to avoid a multiplicity of tariffs, and perhaps the discretion of this Commission, might to some extent limit the exercise of that privilege. I for one think it would be much better if all the principal railway supplies did move upon tariffs of this character.

In my opinion the method now in vogue leads to much evasion and discrimination. Our last annual report makes reference in two cases—United States v. M. & R. R. R. Co. and United States v. L. S. & M. S. Ry. Co.—in which fines were imposed for illegality in the transportation of company material. In each case the traffic was billed to that point where the best division could be obtained and stopped off at an intermediate point. While the fraud in these two instances was detected and punished there were probably hundreds of instances which escaped observation.

An examination of our correspondence files will show that trouble is constantly arising from the fact that the railroad bases the price for its supplies upon the division which it expects to obtain from the point of origin to the junction point instead of upon the local rate up to that point. It is evident that carriers select for the billing point not that station at which the traffic is to be actually used but at that at which the most favorable division can be obtained. To my mind it would be better on all accounts if carriers were required to publish a rate up to the junction point upon all railway supplies which move in very considerable quantities. Such a rate would be known to every one, would be paid by all alike, and could be corrected if discriminatory or unjust.

It is pointed out that these tariffs do not apply to fuel for the use of electric railroads but only for steam railroads. The kind of motive power used can not, it seems to me, distinguish between different railroads in this particular, but this is not a reason for refusing to permit the publication of these rates. When attention is called to an actual discrimination of this kind, resulting from one of these tariffs, it can be and should be corrected.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE INTERSTATE COMMERCE COMMISSION and The United States, appellants,
v.
THE BALTIMORE AND OHIO RAILROAD Company; The Pennsylvania Railroad Company, The Pennsylvania Company, et al., appellees. } No. 719

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

This case involves the legality of what have generally been known as the "restricted coal rates."

It comes up on appeal under section 2 of the Commerce Court act of June 18, 1910 (36 Stat. L., 539, 1146), from an order granting (without opinion) a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission.

The essential portion of the commission's order is as follows, and the question is whether it should have been enjoined:

> *It is ordered*, That the above-named respondents and interveners be, and they are hereby, directed, on or before the 15th day

of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from their present practice of maintaining and using tariffs on coal, the rates in which are restricted to shipments of or for certain consignors or consignees, or when the coal transported is for a particular use.

It is further ordered, That said respondents and interveners be, and they are hereby, directed, on or before said 15th day of May, 1911, to cease and desist, and for a period of two years thereafter to abstain, from maintaining any rates on coal which are applicable only to the shipments of certain consignors or consignees, or when the coal transported is put to a designated use, and which rates are not open alike for all shippers. (R., 27.)

ARGUMENT.

In its terms this order, so enjoined, was directed exclusively against the restriction of rates to coal of certain consignors or consignees or for designated uses; and it would seem to be directly within the principle laid down by this court in—

Int. Com. Com. v. *D., L. & W. R. R.* (The Forwarders' case), 220 U. S., 235.

N. Y., N. H. & H. R. R. Co. v. *Int. Com. Com.* (The Coal Commodity case), 200 U. S., 361, 391–395.

Since these decisions we assume that the illegality of a discrimination based exclusively on the identity of the shipper or of the consignee, or on the intention with which the goods are shipped or received, or on

the use to which they are put, is no longer open to argument.

This appears to have been recognized by the petitioners, for they seek to defend the discrimination as based on circumstances *dehors* this specific line of distinction stated in the order and in their published tariffs. Their claim (petition, p. 3) is that the following incidents, alleged to be attached to the transportation of coal for railroads or railroad uses, make that coal different for transportation purposes from the same coal if shipped for other consignees or for other uses:

(*a*) The delivery is made on the exchange tracks used for all through shipments and not on the side tracks used for local deliveries. (Tr., p. 3.)

(*b*) No free car time is allowed.

(*c*) No liability continues after the car is placed on the exchange track.

(*d*) The division of the through rate from the junction point to the point of consumption belongs to the consuming carrier.

(*e*) Most of the coal is for locomotive use, and the fueling stations (the final destinations on the consuming line) can not be predicted at the time of shipment.

(*f*) There is no commercial competition between coal used for railroad fuel and for other uses.

This is as if the railroads, having published a rate of $1 for goods if shipped to Jones and a rate of $2 for the same goods if shipped to Brown, should seek to justify by alleging that in fact Jones's sidetrack

was different from Brown's, or that Jones used his free time and Brown did not, or that Jones was litigious while Brown was not, and so on.

In fact, the commission found both that the circumstances claimed to justify the discrimination did not exist as to all railroad coal to which the benefit was given (Tr., p. 17), and also that they did exist as to most electric-railway coal to which the benefit was not given (Tr., p. 13).

The commission also found that the differences in circumstances, even if existing coextensively with the definition made by the rates, were so trifling and unsubstantial as not to justify any difference in rates.

On both these points the position of the commission was clearly stated as follows (Tr., p. 16):

> There can be no substantial difference in the conditions of transportation of this railway-fuel coal from a point on the producing line to a point on the consuming line as compared with the transportation of commercial coal between those same points. There may be slight differences in the terminal service required at destination, but that is true as to all shipments to any point of importance. It requires more, and somewhat more expensive, service to deliver one shipment than to deliver another, but that difference is not at all recognized in the rates, which are the same. The difference in transportation conditions must be substantial in order to remove the application of section 2 of the act. If a lower rate upon railway-fuel coal is warranted because the railroad has facilities for receiving coal which

> make the cost of the service less, any shipper who provided like facilities must be entitled to the same rate accorded the railway.

These conclusions of the commission are enforced both by the fact that the railroads did not themselves define the restrictions in terms of the conditions now sought to justify them, and by the fact that they made the discriminations in rates so great as to be self-evidently disproportionate to those alleged differences. For example, commercial shipments of coal from West Virginia pay a rate of $1.90 per ton to Potomac Yard, D. C., and $1.70 to Strasburg, Va.; but the Elkins Coal and Coke Company pays on the same coal, if shipped for use of the Southern Railway, a rate of only $1.34 to either point. (R., 37, 38.) Here we have a difference as great as 56 cents a ton (and in two other instances as high as 65 cents a ton, R., 36) alleged to have been founded on the trifling circumstances above enumerated; and also we find the railroad fuel coal going at the same rate to Potomac Yard, D. C., as it pays when going to Strasburg, Va., while coal for other uses pays 20 cents more to the former point than it pays to the latter.

However, we do not desire to enter into details as to the considerations pro and con, because for the purpose of this appeal it seems sufficient to say that all those considerations went merely to two questions of fact:

First. Did the differences alleged exist?

Second. If they existed, were they sufficiently substantial to justify a variation in the rates?

The weighing of the multitude of facts presented upon these questions and the striking of the balance was plainly the exclusive function of the Interstate Commerce Commission, whose determination of such questions of fact is, and must be, final; and it is not the function of the Commerce Court, which is empowered to pass only upon questions of law.

The face of the report of the commission shows that, as a tribunal appointed by law and informed by experience, it had abundant and proper evidence at its command upon which to arrive at its conclusion.

No charge is made that the petitioners were denied a full hearing, or that the commission in any manner transcended its power or authority, or that the commission in any way failed to proceed in all respects in conformity to the statute, or that anything was considered by the commission which should not have been considered, or that anything was not considered which should have been considered.

The finality of the conclusion of the Interstate Commerce Commission under such circumstances has been announced by this court again and again and again—so often, indeed, that the court as long ago as 1906 began to state that it was indulging in what it called "tiresome repetition." (206 U. S., p. 466; 218 U. S., p. 110.)

Still it would seem that indefinite continuance of the repetition is necessary.

The petition presented no equity. The injunction was improvidently granted, the interlocutory order and decree should be reversed, and the cause should be remanded with directions to dismiss the petition.

Respectfully submitted.

WINFRED T. DENISON,
Assistant Attorney General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

JANUARY, 1911.

○

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES *v.* BALTIMORE AND OHIO RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY ET AL.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 719. Argued January 12, 15, 1912.—Decided June 7, 1912.

An interstate carrier may not charge a different rate for the transportation of raiload-fuel coal to a given point than for the transportation of commercial coal to the same point. It would be an illegal preference or discrimination under § 3 of Act to Regulate Commerce.

Tariffs are but forms of words, and the Interstate Commerce Commission, in the exercise of its powers to administer the Act to Regulate Commerce, can look beyond the forms to what caused them and what they are intended to, and do, cause.

A railroad company cannot be made a favored shipper and given a lower rate on the same commodity to the same point than other persons.

A railroad company is not to be put on the same basis as a locality and entitled to preferential rates to accommodate competitive conditions. *The Import Rate Case*, 162 U. S. 197, distinguished.

THE question in the case is whether railroad companies may charge a different rate for the transportation of coal to a given point to railroads than to other shippers, the coal being intended for the use of the railroads as fuel.

The Interstate Commerce Commission held that a charge of a different rate was an unlawful discrimination against other shippers and made an order requiring a cessation of such charge. The execution of the order was enjoined by the Commerce Court.

A number of railroads are petitioners and we shall refer to them as the companies.

The companies attack in their petition the order of the Interstate Commerce Commission on several grounds, which may be summarized as follows: The movement of coal traffic from the point of origin to the point or points of junction to receiving carriers is different from the movement of coal to be delivered locally at such junction points.

The traffic is not governed by the rates published under the Act to Regulate Commerce which apply to the traffic in coal not intended for use by consuming railroads, because the charges go to the carrier itself. If the coal be shipped under a through rate applicable to other coal the actual rate upon which it moves to the rails of the consuming road is the division of the through rate going to the roads over which the traffic moves to the junction point with the rails of the consuming road. The division of the rate beyond that point goes to the consuming road itself.

All but an inconsiderable part of such coal is necessary and intended for use as fuel in locomotives. The fueling stations are often many, and are located at convenient points along the line at varying distances from the junction points, and it is not possible at the time of shipment to tell at what point a carload of coal will be needed. If made on a through rate they must be billed and transported to a point to which the through rate is published. Even if a centrally located distributing yard for fuel be established, and all shipments billed on a through rate to that yard, there must be a reverse movement of the coal between that point and the point of junction.

The fact that fuel coal on the line of a consuming carrier is not governed by the published rates makes the commercial competitive conditions different between such coal and other coal. The value to the shipper is not the same or measured by the same conditions. There is no competition between the fuel coal and other coal.

Because of the circumstances and conditions differentiating the traffic in fuel coal the companies have for a number of years past published and filed, as required by law, separate tariffs of the rates to be charged and received by them for the transportation of such coal from points of origin to the junction point of delivery to the consuming carrier. The tariffs vary in their definitions or descriptions of the traffic to which the rates apply, but in each case the traffic is such that it would move in reality, not under the published through rates, but would move under the special conditions which have been stated. Some of the tariffs apply only to coal intended for use and used for locomotive fuel. The rates named in the tariffs are open and available to all producers and shippers, if the shipments be made under the special conditions stated.

On January 4, 1910, the Interstate Commerce Commission, of its own motion, instituted an inquiry under an

order of that date entitled, "In the matter of Restrictive Rates," Docket No. 3053, making the Baltimore & Ohio and the Pennsylvania Railroad companies parties to the proceeding. The other companies from time to time were admitted as intervenors. Testimony was taken, argument heard, and the Commission entered the order complained of in which the Commission required the companies to cease and desist, on or before May 15, 1911, and for a period of two years to abstain from using the tariffs on fuel coal stated.

The Commission erred in its construction of the Act to Regulate Commerce in that it held the facts and circumstances found by it did not distinguish fuel coal from other coal, and that the different conditions of their transportation were not in law circumstances and conditions necessary or proper to be considered in applying the provisions of § 2 of the act.

The Commission erred in holding that the rates on fuel coal under § 2 should be no more nor less than rates for the shipment of other coal from the same point of origin for local delivery at the junction point, the circumstances and conditions showing conclusively that the services done in the transportation of them, respectively, are not alike nor substantially similar, within the meaning of the Act to Regulate Commerce.

The Commission erred in holding that fuel coal should be transported under through rates, as other coal, and that it was unlawful for carriers to publish or charge any rates other than the through rates agreed upon going to the line of the terminal carrier to be used by it in its business as a common carrier. And that, as the charges on such terminal carrier's line must be borne by it, the Commission erred in holding that such circumstance did not differentiate the traffic in such coal from the traffic in other coal, and did not constitute a substantial difference under § 2 in the conditions of transportation.

The Commission erred in holding, further, that any difference in the tariff for fuel coal and not applicable to all other coal was unjustly discriminatory, in violation of § 3.

It appears on the face of the report of the Commission, it is alleged, that it proceeded in making the order upon its view of §§ 2 and 3; that it did not find it necessary to consider any specific tariff or tariffs or the rates named thereby; that the difference in conditions affecting the respective tariffs could not be considered as distinguishing them. And it is alleged that the findings of the Commission are findings of law, as well in regard to the violation of the third section of the act as in regard to violation of the second section. Irreparable damage is alleged, and the alternatives presented of desisting from the carriage of fuel coal at the expense of the loss of large and valuable revenues or accepting divisions of through rates, on both fuel coal and other coal, which will give the companies, as originating or intermediate carriers, a much lower compensation for both classes of traffic than they are now receiving and would continue to receive but for the order of the Commission.

In either case the loss will amount to many thousand dollars. There will be loss, it is alleged, to the producers of fuel coal who have sold coal under contracts for future delivery at junction points, and loss also to producers and shippers who depend on the railroad-fuel business to enable them to operate their mines at all.

A final decree is prayed for the annulment of the order and a temporary injunction enjoining and suspending it pending final hearing and determination.

The petition was supported by affidavits made by a number of coal producers and shippers.

The answer of the Interstate Commerce Commission is directed principally at the third paragraph of the petition, and charges against it as follows: Its allegations relate to

comparisons between coal, on the one hand, consigned to a railroad company, and coal, on the other hand, consigned to some other party. The former is called railroad-fuel coal, the latter is known as commercial coal. In each instance, however, regardless of the consignee, the point of origin and the point of destination of the shipments is the same, but the rate charged for transporting fuel coal is much less than the rate exacted for the transportation of commercial coal over the same line, in the same direction and between the same points. Schedules or tariffs providing for such differences in rates have been heretofore established and put in force and are now maintained and enforced by the companies.

Where the destination is a junction which is a point of connection between the lines of two or more of the companies, the movement of coal, fuel and commercial, is the same, except that at such destination the cars containing fuel coal are ordinarily placed upon what is called an exchange track, which is used in common by the connecting carriers, while the cars containing commercial coal are usually placed upon the side track of the delivering carrier. The cost of delivering both kinds of coal is practically the same, depending upon the nature of the delivery facilities furnished by the companies. Therefore, the cost of delivering fuel coal may be and is less than the cost of delivering the commercial coal, but the reverse is sometimes the case. It is alleged, however, that such differences are similar to differences pertaining to some shipments of commercial coal compared with other shipments.

Generally what is called "free time" is allowed by the companies, that is to say, a certain period of time for unloading the coal is allowed. If the coal is unloaded within that time, no charge is made for the use of the car. If that time be exceeded a charge of $1.00 for each day or fraction of a day in excess of the "free time," known as a demurrage charge, is exacted by the companies, while the

compensation paid by one carrier to another carrier for the use of a car owned by the latter is twenty-five cents a day. Where the coal transported is fuel coal no "free time" is allowed, nor is such demurrage charge exacted or collected. These differences, however, are offset, and much more than offset, by the differences in the rates of transportation between the different coals.

Where the destination of the shipment of coal is not a point of connection between the lines of two or more of the companies the circumstances and conditions pertaining to the transportation and delivery of coal are the same as above described, except that at such destination there are no exchange tracks used in common by two or more of the companies. Where the shipment passes over more than one line of railway to such destination, delivery by one of the companies to another is made in the same way and under similar circumstances and conditions regardless of whether the coal be fuel or commercial.

The lower rates established by the companies and applied by them to the transportation of fuel coal are not open alike to all shippers but are, by reason of the schedules and tariffs above mentioned and by reason of the practices of the companies, confined to shippers of fuel coal and denied to shippers of all other coal, including commercial coal.

The Commission denies the errors attributed to it, and alleges that its report shows as follows: "We have never held that the local rate to the junction point must be paid on shipments that are going beyond that point. What we have said is that the local rate to the junction point shall be the same for all shippers to that point, and that the through charges on shipments going beyond the junction point shall be alike for all shippers to the same destination."

The Commission alleges (somewhat singularly, on information and belief) that it considered all facts, circum-

stances and conditions pertinent to the subject-matter of the order, including degrees of difference and distinction, and each and all of the tariffs and rates of the companies which are affected by the order, and did not entertain the opinion attributed to it, that the facts, circumstances and conditions affecting the particular traffic could not be lawfully considered by it as distinguishing the traffic in railroad-fuel coal from the traffic in other coal.

It is alleged that the traffic is interstate, and that fuel coal as compared with other coal, including commercial coal, is a like kind of traffic; that the services performed by the companies in connection with the transportation of fuel coal as compared to the services performed by them in connection with the transportation of other coal, including commercial coal, are alike and contemporaneous, and are performed under substantially similar circumstances and conditions. It is hence alleged that the companies are violating §§ 2 and 3 of the Interstate Commerce Act.

The final allegation of the Commission is that the matters are within its jurisdiction, and that therefore the correctness of its findings is not open to review in the Commerce Court or any other court.

Mr. P. J. Farrell for the Interstate Commerce Commission:

In failing to dismiss the bill for want of equity, and in granting the temporary injunction, the Commerce Court committed errors which should be corrected by a reversal of the decree.

Circumstances and conditions arising before traffic is delivered by the consignor to the carrier for transportation at point of origin, and those arising after the traffic is delivered by the carrier to the consignee at point of destination, cannot be used to justify disparities in rates, where, as here, the transportation is over the same line, in the same direction, and between the same points.

Wight v. *United States*, 167 U. S. 512, 518; *Int. Com. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166, 167; *Int. Com. Comm.* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235, 252–254. If circumstances and conditions arising after the traffic is delivered by the consignor to the carrier at point of origin and before it is delivered by the carrier to the consignee at point of destination, but which are wholly artificial and entirely created by the carriers, may be used to justify such disparities, a carrier cannot be prevented from indulging in such discriminations as it may wish to make, to the extent at least of charging one party a rate greater than the rate it contemporaneously accords to another party, for the transportation of a like kind of traffic, over the same line, in the same direction, and between the same points.

While a carrier may transport its own property at will from one point to another upon its own line, regardless of the rates named in its published schedules, provided the title to that property does not change while it is in transit; and the division of a through rate for the transportation of property from a point of origin on the line of one carrier to a point of destination on the line of another carrier are a matter of agreement by and between the carriers who perform the transportation service; a carrier who uses the property may not, for the purpose of obtaining, for the transportation of the property from such point of origin to a point of intersection between its own line and the line of such other carrier, a rate which is less than the rate contemporaneously exacted from other shippers for the transportation of a like kind of property from said point of origin to said point of intersection, ship the property from such point of origin to a point of destination on its own line, under a through rate published and filed and made applicable to such transportation, and, when the property reaches its own line, either use the property at such point of intersection or transport it to a point on its

own line other than the point to which such through rate applies, and then pay for the transportation from such point of origin to said point of intersection, not the rate applicable to the transportation between those points, but the division of the through rate which goes to such other carrier, as aforesaid. And if it does so it thereby subjects itself to the penalties provided for in the act and made applicable to cases of false billing and misrepresentation. *Wight* v. *United States, supra; Capital City Gas Co.* v. *Central Vermont Ry. Co.*, 11 I. C. C. Rep. 104. See, also, *Matter of Contracts of Express Companies*, 16 I. C. C. Rep. 246; *Hitchman Coal & Coke Co.* v. *Baltimore & Ohio R. R. Co.*, 16 I. C. C. Rep. 512.

The Commerce Court erred in substituting its own judgment for that of the Commission concerning the character of the traffic, transportation services, discrimination and preference and prejudice involved. *Int. Com. Comm.* v. *Delaware, L. & W. R. R. Co., supra.* See, also, *Balto. & O. R. Co.* v. *Pitcairn*, 215 U. S. 481; *Southern Pacific Co.* v. *Int. Com. Comm.*, 219 U. S. 433.

The court erred in entering the interlocutory decree and granting the temporary injunction, without complying with the requirements of § 3 of the Commerce Court Act of June 18, 1910.

If the Commerce Court may, simply as a matter of discretion, for its own convenience, the convenience of carriers, or some other similar reason, enjoin temporarily enforcement of an order of the Commission, it may destroy, for all practical purposes, the power of the Commission and render impossible its regulations.

Under present conditions, there appears to be nothing for this court to do except to examine the entire record and determine whether the matters included therein justify the action taken by the Commerce Court.

A construction of the law which makes necessary such a method of procedure is not reasonable, because it in-